

Original

No.

8996.

In the Supreme Court
of the
State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent,
VS.

THE GOLD RUN DITCH AND MINING CO.,
Appellant.

Appellant's Points and Authorities.

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THE UNIVERSITY OF CHICAGO

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THE PEOPLE OF THE STATE OF
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THE GOLD RUN DITCH AND
MINING COMPANY,

Appellant.

Points and Authorities of Appellant.

This is an action brought by the Attorney General, in the name of the people of the State, for an injunction to prevent the defendant from working its hydraulic mine.

It is alleged in the complaint that hydraulic mining has been practiced for twenty years previous to the commencement of this action, principally in the counties of Butte, Yuba, Sierra, Nevada and Placer, and to some extent in other mining counties. That tailings from hydraulic

mines have been deposited in the American and Sacramento rivers, and upon a large amount of lands of citizens of this State, adjacent to the said rivers, so as to seriously impair the navigation of the Sacramento river, injure such lands, and to interfere with the drainage of Sacramento City and the valley lands, and also to injure the health of the inhabitants.

That the defendant is the owner of a hydraulic mine, situated in Placer County, about 70 miles from Sacramento City, on the North Fork of the American River, and is working the same by the hydraulic process, and discharging the tailings therefrom into the North Fork of the American River; and thereby so fouls the waters of the American River as to render them unfit for domestic use, and *largely* and *materially* adds to the deposits in the rivers and upon the adjacent lands aforesaid.

The defendant moved to strike out so much of the complaint as alleged injuries to lands of citizens, and particularly designated the portions to be stricken out. The Court overruled the motion, defendant excepted, and a bill of exceptions was allowed and certified. Defendant then demurred to the complaint, for substantially the same reasons, and in addition thereto, that the Attorney-General had no authority to bring this action. The Court overruled the demurrer.

The answer admits the ownership and working of the defendant's mine, and the discharge into Cañon Creek, a tributary of the North Fork of the American River, of so much tailings as is absolutely necessary in working its mine; but denies that the navigation of the Sacramento river has been injured by tailings from its mine, or by tailings from hydraulic mines; and denies that any tailings from its mine have been or will be carried down into the rivers or upon the adjacent lands described in the complaint. Defendant also pleads custom, prescription, the Statute of Limitations, and license by Congress and the State, in justification for working its mine as aforesaid.

The case was tried by the Court, without a jury. The Court made and filed its findings of fact and conclusions of law. Defendant moved for a new trial. The Court overruled the motion and entered a judgment; and, among other things, enjoined the defendant from discharging any debris from its mine into the North Fork of the American River, or into any stream tributary thereto, and especially into Cañon Creek, which is the only outlet for the water and tailings from said mine. Defendant appeals from the judgment granting the injunction, and from the order overruling the motion for a new trial. By agreement of counsel and leave of the Court, the testimony, with the exceptions reduced to writing at the

trial, contained in 45 volumes, was made a part of the statement on appeal, and forms a part of the record here.

I.

The Court Erred in Denying the Motion to Strike out Portions of the Complaint.

The portions designated to be stricken out, are the allegations of injuries to lands owned by citizens, which does not constitute a public nuisance for which the State can maintain an action.

Bacon's Abridgment, p. 223.

Adams' Equity, 7 Am. Ed., p. 210.

3 *Greenleaf on Ev.*, Sec. 186.

King vs. Morris & Essex R. R. Co., 18 N. J. Eq., 397.

Stetson vs. Fluxon, 19 Pick., 147.

4 *Black. Com.*, 166, etc., etc.

1 *Russell on Crimes*, 435, etc., etc.

3 *Black. Com.*, 216, etc., etc.

Cooley on Torts., 565, etc., etc.

Yolo County vs. Sacramento, 36 Cal., 193.

People vs. Albany & Susquehanna R. R. Co., 57 N. Y., 161.

People vs. Stratton, 25 Cal., 242.

Mississippi R. R. Co. vs. Ward, 2 Black, 485.

II.

The Court erred in overruling the demurrer to the Complaint.

First—The Attorney-General had no authority to bring this action.

The powers of the Attorney-General are defined by statute, and he cannot legally exercise any authority not conferred upon him thereby.

His general duties are fully and clearly defined in Section 470 of the Political Code. All his powers are carefully enumerated in the codes, and this enumeration fixes the limit of his official authority.

Political Code, Secs. 470, 601, 2546.

Code Civ. Proc., Secs. 803, 804, 1272.

Civil Code, Secs. 382, 1405.

The institution and prosecution of an action such as the case at bar, is neither a part of his duty nor within his power.

People vs. Stratton, 25 Cal., 242.

Second—The causes of action arising out of the alleged injury to the navigability of the Sacramento River, and the alleged injury to the health of the inhabitants of the Sacramento Valley, cannot, under any known rule of pleading, be properly united in the same complaint with the cause

of action arising out of alleged injuries to the lands adjacent to the American and Sacramento rivers, and which are the property of private individuals.

These several causes of action are not even separately stated in the complaint.

Code Civ. Proc., Sec. 430.

Third—The demurrer should have been sustained on the ground of ambiguity and uncertainty.

Fourth—The demurrer should have been sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant, for the reason, among others, that it does not appear that the plaintiff has any interest in the subject matter of the action.

People vs. Stratton, 25 Cal., 249.

III.

The findings do not sustain the Judgment.

One of the most important issues of fact was whether or not the defendant had contributed materially to the evils described in the complaint. The Court DID NOT FIND that defendant had so contributed, but on the contrary found that it

was "unable to say that the defendant's mine
 "alone, without reference to the débris from
 "other mines, materially contributes to the evils
 "mentioned; or, in other words, if there were no
 "mining operations save those of the defendant,
 "I am not prepared to say that it would mate-
 "rially injure the valley lands, or the navigation
 "of the river. It is the aggregate of débris from
 "all the mines, which produces the injuries men-
 "tioned in these findings."

Trans. on App., fol. 199-200.

This finding is either no finding on the issue, or is a finding that the contribution of the defendant to the evils mentioned was immaterial. If it is no finding on the issue, the judgment must be reversed.

Paulson vs. Nunan, 54 Cal., 123.

Byrnes vs. Claffey, 54 Cal., 155.

Glasscock vs. Ashman, 52 Cal., 420.

The fair construction of the finding is that defendant alone, without reference to the acts of others, did not materially contribute to the evils mentioned, and such finding is insufficient to sustain the judgment.

Code of C. P., Sec. 463.

Green vs. Palmer, 15 Cal., 411.

Queen vs. Russell, 77 Eng. Com. Law Rep.,
 3 E. & B., 942.

Rex vs. Tindall, 33 Eng. Com. Law Rep.,
6 Adolp. & Ellis, 143.

St. Helena Smelting Co. vs. Tipping, House
of Lords cases, Vol. 11, p. 642.

Wheeler vs. City of Worcester, 10 Allen, 591.

IV.

The liability of the defendant is not increased by the fact that other miners are discharging debris into the stream.

The defendant is not liable for the aggregate deposits, but is only liable, if liable at all, for its individual acts.

Little Schuylkill Navigation Co. vs. Richards
admr., 57 Penn. St., 142.

Chipman vs. Palmer, 77 N. Y., 51.

Keyes vs. Little York, 53 Cal., 724.

Sellick vs. Hall, 47 Conn., p. 260.

Woodruff vs. North Bloomfield G. M. Co. et al.,
8 Sawyer, p. 628.

Woodyear vs. Schafer, 57 Maryland, p. 1.

Thorpe vs. Brumfitt, Law Rep., 8 Ch. App.,
650.

Hillman vs. Newington, 57 Cal., 56.

Cooley on Torts, pp. 78 and 79.

Pomeroy on Remedies and Remedial Rights,
Secs. 307 and 308.

In the foregoing authorities a distinction is made between joint and several tort-feasors.

The six cases first above cited, are examples where the defendants were acting separately and independently of each other, at different times and places, and the injury resulted from a union of consequences of their several wrongful acts. In such cases the defendants are not *jointly* liable, but are only *severally* liable to the extent of their individual acts.

The other two cases above cited, *Thorpe vs. Brumfitt* and *Hillman vs. Newington*, are cases where, by the wrongful *concurrent* acts of several tort-feasors, a direct injury is produced. In such cases the defendants are both jointly and severally liable.

Both *Thorpe vs. Brumfitt* and *Hillman vs. Newington* were cited by the Court in *Woodruff vs. North Bloomfield Co.*, but had no application to that case.

Thorpe vs. Brumfitt is also cited in *Woodyear vs. Schafer*, but the Court failed to distinguish that the two cases were not analagous.

Taking all the cases together, there is no conflict in the decisions. Hence the defendant in the case at bar can only be held liable, if liable at all, for its individual acts. There is no contrary decision. The *dicta* on the subject have arisen by confounding the cases where the tort-feasors are

both jointly and severally liable, with the cases where they are only severally liable.

Woodruff vs. North Bloomfield is referred to for the purpose of showing that the apparent assumption, by the Court, in that case, that *Thorpe vs. Brumfitt* and *Hillman vs. Newington* furnished authority for saying either that the defendants in the *Woodruff* case are jointly liable, or that the liability of either of the defendants can be increased by the acts of any of the other defendants or other miners discharging debris into the stream, is not warranted by the cases cited. *Woodyear vs. Schafer* is referred to for a like reason.

V.

The Defendant is entitled to the reasonable use of its property while engaged in a lawful industry.

The record shows that the defendant has conducted its mining operations in good faith, without malice or negligence, and in a reasonable manner, and no injunction ought to have been granted.

Tenney vs. Miners' Ditch Co., 7 Cal., 335.

Esmond vs. Chew, 15 Cal., 137.

Gibson vs. Puchta, 33 Cal., 310.

Auburn Plank Road vs. Douglass, 9 N. Y., 445.

- Elliott vs. Fitchburg R. R. Co.*, 10 Cush., 191.
Merrifield vs. Worcester, 110 Mass., 216.
Cooley on Torts, 584.
Pitts vs. Lancaster Mills, 13 Met., 156.
City of Springfield vs. Harris, 4 Allen, 494.
Snow vs. Parsons, 28 Vermont, 459.
Maitland vs. Insurance Co., 3 Rich. L. R. (So. Car.), 331.
Gould vs. Boston Duck Co., 13 Gray, 452.
Red River Mills vs. Wright, 16 Rep., 560.
High on Injunctions, Sec. 824.
Ross vs. Butler, 19 N. J. Eq., 294.
Duncan vs. Hayes, 22 N. J. Eq., 25.
Wason vs. Sanborn, 45 N. H., 169.

VI.

Custom.

The findings and opinion of the Court show that the acts of the defendants are authorized by a universal custom, founded on necessity, which has prevailed in California for the last 34 years, which has the force of law, and that therefore an injunction ought not to have been granted.

- Code of C. P.*, Sec. 748.
Sparrow vs. Strong, 3 Wall., 97.
Atchison vs. Peterson, 20 Wall., 512.
Basey vs. Gallagher, 20 Wall., 670.
Jennison vs. Kirk, 98 U. S., 453.

- Broderick vs. Water Co.*, 101 U. S. 274.
Harvey vs. Ryan, 42 Cal. 628.
North Noondaw M. Co. vs. Orient Co., 6
 Sawy., 279.
Jupiter Co. vs. Bodie Co., 6 Sawy., 96.
Ivimey vs. Stoker, Law. Rep. 1 Ch. App.,
 403.
Snow vs. Parsons, 28 Vt., 462.
Washburn on Easements, p. 123.
Carlyon vs. Lovering, 1 Hurls. & N., 784.
Esmond vs. Chew, 15 Cal., 137.
Gregory vs. Harris, 43 Cal., 38.
Bliss vs. Kingdom, 46 Cal., 651.
Irwin vs. Phillips, 5 Cal., 140.
Conger vs. Weaver, 6 Cal., 548.
Merced Mining Company vs. Fremont, 7 Cal.,
 327.
Hill vs. King, 8 Cal., 338.

VII.

Prescription.

The defendants and its predecessors in interest have exercised the right to discharge debris into the stream, in the same manner, without any increase in the use, for more than 27 years previous to the commencement of this suit, and the defendant has acquired the right, by prescription,

to continue to do so, as against citizens owning the lands described in the complaint.

Civil Code, Secs. 806, 1410-1411.

American Co. vs. Bradford, 27 Cal., 367.

Grigsby vs. Clear Lake Co., 40 Cal., 396.

Goldsmid vs. Turnbridge Wells Improvement Co., 1 L. R. Ch. App., 349.

Crosby vs. Bessey, 49 Me., 539.

Carlyon vs. Lovering, 1 Hurls & N., 784.

Washburne on Easements, p. 630.

Wood on Nuisances, p. 765, sec. 707.

VIII.

The acts of the defendant are authorized by Congress and the Legislature of the State, so far as they affect public rights, and therefore do not constitute a public nuisance.

No gold mining has been practiced in California, except by the use of the streams for drainage and outlets; and it is impossible to conduct such mining without such use of the streams, which involves the flow and deposit of mining débris in the navigable rivers. The legislation of both the United States and the State has been enacted with full knowledge of these facts.

The United States and the State, acting concurrently, have the power to legalize the use of

the navigable rivers for the discharge of mining debris. In the absence of legislation by Congress the State alone may do it.

Pound vs. Turck, 95 U. S., 459.

Escanada Co. vs. Chicago, 107 U. S., 678.

LEGISLATION BY CONGRESS.

The 5th section of the mining Act of 1866 reads as follows:

“As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for the working of mines, involving easements, drainage and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.” (Revised Stats., Sec. 2338.)

The 17th section of the placer mining Act of 1870, expressly extends to placer claims the right granted by Section 5 of the Act of 1866, above set forth, in the following language: “That none of the rights conferred by Sections 5, 8 and 9 of the Act to which this is amendatory, shall be abrogated by this Act, and the same are hereby extended to all public lands affected by this Act.”

On the 14th day of June, 1880, the following provision was inserted in what is known as the

River and Harbor Bill: "The Secretary of War is
 "hereby directed to cause to be made such exam-
 "inations and surveys as may be necessary *to de-*
 "vise a system of works to prevent the further
 "injury to the navigable waters of California from
 "the debris from the mines, and the estimates of
 "the cost of such works, and report the result of
 "such examinations, surveys and estimate of cost
 "of proposed works, made in pursuance thereof,
 "to Congress at its next session."

21 *Stats. at Large*, p. 169.

Upon the coming in of the report so authorized,
 in August 1882, Congress passed the following
 provision in the appropriation bill, to-wit: "For
 "the improvement and *protection* of the navigable
 "channels of the Sacramento and Feather rivers,
 "to be expended under the direction of the Sec-
 "retary of War, \$250,000."

By these various Acts, Congress, by necessary
 implication, consented to the use made of the
 navigable streams by the miners.

"A thing which is within the intention of the
 "makers of the statute, is as much within the
 "statute as if it were within the letter."

U.S. vs. Freeman, 3 How., 565.

See also:

U. S. vs. Babbitt, 1 Blacks, 61

U. S. vs. Hodson, 10 Wall., 406.

Brooms Legal Maxims, star p. 463-4.

Civil Code, Sec. 3522.

LEGISLATION OF THE STATE.

For the purpose of providing drainage and easements for the complete development of the mines, the Legislature of this State passed an Act, which will be found in the Code of Civil Procedure, Title VII., Part 3, Sections 1237 to 1263. This Act went into effect on April 4, 1872.

Code of Civil Procedure, Sec. 1259.

Section 1238 provides as follows:

" Subject to the provisions of this title, the
 " right of eminent domain may be exercised in
 " behalf of the following public uses. * * *
 " 5. Roads, tunnels, ditches, flumes, pipes and
 " dumping places for working mines, also outlets,
 " natural or otherwise, for the flow, deposit
 " or conduct of tailings or refuse matter from
 " mines; also an occupancy in common by the
 " owners or possessors of the different mines, of
 " any place for the flow, deposit or conduct of
 " tailings or refuse matter from their several
 " mines."

The 8th Subdivision of Section 4 of the Act of March 29, 1878 (Stats. of 1877-8, page 635), reads as follows:

"The State Engineer shall also inquire into
"the relation which hydraulic mining bears to
"the navigation of the rivers, and to their carry-
"ing capacity, and inquire into the question of
"the flow of debris from mines into the water-
"courses of the State, and ascertain the amount
"and value of agricultural lands and improve-
"ments which have been covered up or injured
"by the overflow or deposit of debris coming
"from hydraulic and other mines in the Sacra-
"mento Valley, *and devise a plan* whereby the
"injuries caused thereby can be averted *without*
"*interfering with the working of such mines.*"

The first clause of Sec. 1 of Article 14 of the New Constitution, adopted in 1879, declares
"that the use of all water now appropriated, or
"that may hereafter be appropriated, for sale,
"rental or distribution, is hereby declared to be
"a public use, and subject to the regulation and
"control of the State, in the manner to be pre-
"scribed by law."

It is evident that the State intended, by the Acts above set forth, that mining should be continued, and that the necessary use of the navigable rivers for that purpose was authorized.

"Acts authorized by law are not a public nuisance."

Wood on Nuisances, p. 852, Sec. 753.

Cooley on Torts, p. 615.

Transportation Co. vs. Chicago, 99 U. S., 635.

Rex vs. Pease, 4 Barn. & Adol., 30.

Hinchman vs. Paterson, 17 N. J. Eq., 75.

Davis vs. Mayor of N. Y., 14 N. Y., 524.

Veazie vs. Dwinel, 50 Me., 482.

Carson vs. Central R. R. Co., 35 Cal., 333.

McDonald vs. English, 85 Ill., 235.

Pittsburgh vs. Brown, 67 Ind. 45, S. C., 33

Am Rep., 73.

Attorney Genl. vs. Evert Booming Co., 34

Mich., 475.

Easton vs. R. R., 24 N. J. Eq., 55.

People vs. Law, 34 Barb., 514.

First Bap. Ch. vs. Utica & Schenectady R. R.

Co., 6 Barb., 313.

People vs. Gaslight Co., 64 Barb., 55-69.

Harris vs. Thompson, 9 Barb. 353.

Green vs. Swift, 47 Cal., 536.

Comm. vs. Reed, 34 Pa. St., 282.

Stoughton vs. State, 5 Wis., 291.

Wilson vs. Blackbird Creek Marsh Co., 2

Pet., 245.

IX.

Equitable Considerations.

No injunction ought to have been granted in any event, in this case, by reason of delay, acquiescence and other equitable circumstances.

1 *High on Injunctions*, 787.

2 *Story's Eq. Juris.*, 5 ed., sec. 924 a.

3 *Pomeroy's Eq. Juris.*, sec. 1349.

Attorney-General vs. Gas Consumers Co., 3 D. M. & G., 340.

Easton & McMahon vs. New York & Long Branch R. R. Co., 24 N. J. Eq., 49

Attorney-General vs. Delaware R. R. Co., 27 N. J. Eq., 3.

Bassett vs. Salisbury Co., 47 N. H., 426.

Edwards vs. Allouez M. Co., 38 Mich., 46; S. C., 31 Am. Rep., 301.

Gilbert vs. Showerman, 23 Mich., 449.

Parker vs. Winnipiseogee Co., 2 Black, 545.

Birmingham Canal Co. vs. Lloyd, 18 Vesey Jr. Rep., 514.

Tichner vs. Wilson, 4 Halst. Ch., 197.

Gray vs. Ohio R.R. Co., 1 Grant Cases, 412.

Lady Stanley of Alderly vs. Earl of Shrewsbury, L. R. 19 Eq. Cases, 616; S. C. 13 Moaks Eng. Rep., 546.

Binney's Case, 2 Bland. Ch., (Md.) 99-103.

We respectfully submit that the judgment of
the Superior Court should be reversed.

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The responsibility of the judgment of
the Court is placed on the shoulders of the

THE COURT OF APPEALS

Service accepted by copy this 26
day of *December* A. D., 1883.

Es. Cadevala del

Attorneys for Respondent.